

Environmental Compliance Competency 4.9

Competency 4.9 Environmental compliance personnel shall demonstrate a working level knowledge of contract management to assess contractor performance and ensure accountability.

1. Supporting Knowledge and Skills

- a. Discuss the purpose of contracting as it pertains to the operations of Department facilities.
- b. Explain the types of contracts employed by the Department.
- c. Describe the characteristics of the three major contract types utilized within the Department.
- d. Describe the “Accountability Rule,” and discuss the role it plays in contract management.
- e. Discuss the roles of federal and contractor personnel in contract management.
- f. Define the term, “Federal Norm” and describe its significance to the Department and contractor activities.
- g. Describe the DOE Order 5480.29, *Employee Concerns Management System*, and the role of environmental compliance personnel.

2. Self-Study Activities (Corresponding to the Intent of the Above Competency)

Below are two web sites containing many of the references you may need.

Web Sites		
Organization	Site Location	Notes
Department of Energy	http://wastenot.inel.gov/cted/stdguido.html	DOE Standards, Guides, and Orders
U.S. House of Representatives	http://law.house.gov/cfr.htm	Searchable Code of Federal Regulations

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Review Subpart 17.7 of the Federal Acquisition Regulation (FAR) and Subpart 917.6 of the Department of Energy Acquisition Regulations (DEAR).

EXERCISE 4.9-A Using the FAR and DEAR, discuss the purpose of contracting as it pertains to the operations of Department facilities.

Read DOE Order 5480.19, *Guidelines for the Conduct of Operations at DOE Facilities*, Attachment I, Chapter 1, Operations Organization and Administration.

Review Part 16 of the FAR.

EXERCISE 4.9-B Using the FAR, Identify the three major DOE contract types.

EXERCISE 4.9-C Describe the characteristics of the three major DOE contract types.

Scan 48 CFR 9, DEAR, Part 970, *DOE Management and Operating Contracts*.

Read the Summary section below. This information was extracted from the *Federal Register* (56 FR 28099).

EXERCISE 4.9-D Referring to the summary, briefly describe the Accountability Rule.

EXERCISE 4.9-E Referring to 48 CFR 9, DEAR, Part 970, *DOE Management and Operating Contracts*, describe how the Accountability Rule is applied to unauthorized commitments.

EXERCISE 4.9-F Identify the key elements and features of an effective DOE and operating contractor relationship.

EXERCISE 4.9-G Identify the roles and responsibilities for the Heads of Field Organizations listed in DOE Order 5480.19, *Guidelines for the Conduct of Operations at DOE Facilities*.

Read the information about the “Federal Norm” presented in the Summary section of this study guide. This information was extracted from several 1995 issues of the *Federal Register*.

EXERCISE 4.9-H Define the term, “Federal Norm.”

EXERCISE 4.9-I Describe the significance of the concept, Federal Norm, to the Department and contractor activities.

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Read DOE Order 5480.29, *Employee Concerns Management System*.

EXERCISE 4.9-J What is the purpose of DOE Order 5480.29?

EXERCISE 4.9-K What is the role of DOE technical personnel regarding DOE Order 5480.29?

3. Summary

Contracting for products and services is by far, the least costly method of obtaining the wide variety of products and services needed.

Effective relationships between the Department and operating contractors are based in the site's conduct of operations. The organization and administration of operations should ensure that a high level of performance in DOE facility operations is achieved through effective implementation and control of operations activities. Effective implementation and control of operating activities are primarily achieved by establishing written standards in operations, periodically monitoring and assessing performance, and holding personnel accountable for their performance.

Contracts and the types of contracts vary according to how and what the Department pay for them. All have similarities yet each is unique in its own way. Whether it is an award-fee, fixed-price, or a time-and-materials contract, all require oversight by a DOE employee.

Contracts may be awarded as the result of competitive bids, by direct assignment, or through the "set aside funds" (for projects/products under \$25,000). Not using the full and open competitive bidding process requires justification according to the conditions set down in DOE Order 4200.1C.

DOE uses far more than three types of contracts. As an agency, they may use any of the contract types detailed in the FAR. There are six broad categories, with multiple types of contracts under each category. See below for brief description and references.

1. Fixed-Price Contracts: Includes firm-fixed-price, fixed-price with economic price adjustment, fixed-price with prospective price redetermination, firm-fixed-price level-of-effort, etc. (See FAR part 16.2)
2. Cost-Reimbursement Contracts: Includes cost-reimbursement no fee, cost-reimbursement-plus-award fee, cost-sharing, cost-plus-incentive fee, cost-plus-fixed fee. (See FAR part 16.3)

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3. Incentive Contracts: Includes fixed-price incentive, cost-reimbursement incentive, cost-plus incentive, etc. (See FAR part 16.4)
4. Indefinite Delivery Contracts: Includes definite quantity, indefinite delivery; indefinite quantity, indefinite delivery; and requirements contracts. (See FAR part 16.5)
5. Time-and-Materials, Labor-Hour, and Letter Contracts: Three distinctly different types of contract. (See FAR part 16.6)
6. Agreements: Basic agreements and basic ordering agreements. (FAR 16.7)

In addition to the type of contract, the agency must decide whether the award will result from Sealed Bidding or will be a Negotiated Procurement.

Because it is sometimes difficult to determine what type of contract is contemplated, FAR 16.105 instructs government procurement personnel to insert the clause at FAR 52.216-1 as follows in RFP's or RFQs unless the solicitation is for a Small Purchase: "The Government contemplates award of a . . . (Contracting Officer inserts specific type of contract) contract resulting from this solicitation."

On June 19, 1991, the Department issued a Final Rule (56 FR 28099), known as the Accountability Rule, to amend the Acquisition Regulation (48 CFR 970) in order to incorporate the requirements of the Major Fraud Act of 1988. The provisions of this rule are expected to be incorporated in all new M&O contracts with profit making contractors (at time of contract extension or reselection, or where the Government and incumbent contractor agree to do so prior to expiration of the current contract's term). Starting with FY 1992, all fee negotiation objectives are to be developed using the fee schedules incorporated in the amended regulation. The Accountability Rule contains various provisions to increase the accountability and liability of contractors and subcontractors in their performance of work for DOE at DOE facilities. Examples of these provisions follow:

- The Rule limits liability to the amount of actual award-fee earned plus the actual basic fee earned.
- Liabilities flow down to subcontractors.
- Unauthorized commitments: Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitments, the contracting officer shall advise that person that the work is unauthorized and performance is at the person's own risk.
- Major considerations include:
 - The work is clearly within the sole and exclusive control of the contractor or subcontractor.
 - The increased costs or expenses result from the actions or inactions of the contractor or subcontractor.

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- DOE is not responsible in any way for the act or omission that resulted in the additional cost.
- The contractor shall maintain and administer a financial management system that includes an integrated accounting system and (1) is suitable to provide proper accounting in accordance with DOE requirements for assets, liabilities, collections accruing to the contractor in connection with the work under this contract, expenditures, costs, and encumbrances; (2) permits the preparation of accounts and accurate, reliable financial and statistical reports; and (3) assures that accountability for the assets can be maintained.

In the context of DOE procurement, purchasing, and subcontracting, the “Federal Norm” is an outdated practice that, in effect, requires DOE’s M&O contractors to follow certain Federal-oriented prescribed practices in purchasing and in the award of subcontracts.

In 1995, DEAR, Part 970, *DOE Management and Operating Contracts*, was amended to remove the concept of Federal Norm from the procurement purchasing system objectives and standards. This was done to place greater reliance upon commercial business practices and to reflect the change in Federal contracting procurement principles and practices from those embodied in law and regulation to those based on performance. DOE contracts for the management and operation of DOE facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These M&O contractors have been selected for their technical and managerial expertise and are expected to utilize technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with and work plans approved by DOE.

Purchasing done by M&O contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors’ assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this Subpart 970.71. [60 FR 28741 Jun. 2, 1995]

In DOE, overall responsibility for the oversight of the performance of M&O contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting Officers are responsible for management and operating contractors' conformance with this Subpart and their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs. [48 CFR 970.71]

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The primary purpose of DOE Order 5480.29, *Employee Concerns Management System*, is to complement existing employee-reporting procedures and to allow anonymous and confidential reporting and evaluation of employee environment, safety, and health (ES&H) concerns. The Order contains detailed instructions regarding the minimum content of an Employee Concerns Management System, and the roles and responsibilities of significant stakeholders.

4. Exercise Solutions

EXERCISE 4.9-A Using the FAR and DEAR, discuss the purpose of contracting as it pertains to the operations of Department facilities.

ANSWER 4.9-A Contracting provides flexibility in acquiring the large variety and volume of supplies and services needed by government agencies. Contract types vary (1) according to the degree and timing of the responsibility assumed by the contractor for the costs of performance and (2) by the amount and nature of the profit incentive offered to the contractor.

EXERCISE 4.9-B Using the FAR, Identify the three major DOE contract types.

ANSWER 4.9-B The three major DOE contract types are:

- Cost-plus-award fee
- Fixed-price
- Time-and-materials

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EXERCISE 4.9-C Describe the characteristics of the three major DOE contract types.

ANSWER 4.9-C

CHARACTERISTICS OF THE THREE MAJOR DOE CONTRACT TYPES	
Contract type	Characteristics
Cost-plus-award fee	A contract for a given product or service in which the contractor will be reimbursed for the cost of the product or services and can earn an agreed upon award-fee based upon how well they deliver the product or service.
Fixed-price	A contract for a given product or service in which the contractor will be paid an agreed upon price.
Time-and-materials	A contract for a given product or service in which the contractor will be reimbursed for the actual cost of materials and an agreed upon "hourly" rate for labor performed.

EXERCISE 4.9-D Referring to the summary, briefly describe the Accountability Rule.

ANSWER 4.9-D The answer should consist of two parts: 1) A general overall description, and 2) Any three of the example provisions.

The Accountability Rule, as defined in 56 FR 28099, contains various provisions to increase the accountability and liability of contractors and subcontractors in their performance of work for the DOE at DOE facilities. Examples of these provisions follow:

- The Rule limits liability to the amount of actual award-fee earned plus the actual basic fee earned.
- Liabilities flow down to subcontractors.
- Unauthorized commitments: Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitments, the Contracting Officer shall advise that person that the work is unauthorized and performance is at the person's own risk.
- Major considerations include:
 - The work is clearly within the sole and exclusive control of the contractor or subcontractor,
 - The increased costs or expenses result from the actions or inactions of the contractor or subcontractor, and
 - DOE is not responsible in any way for the act or omission that resulted in the additional cost.

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- The contractor shall maintain and administer a financial management system that includes an integrated accounting system and (1) is suitable to provide proper accounting in accordance with DOE requirements for assets, liabilities, collections accruing to the contractor in connection with the work under this contract, expenditures, costs, and encumbrances; (2) permits the preparation of accounts and accurate, reliable financial and statistical reports; and (3) assures that accountability for the assets can be maintained.

EXERCISE 4.9-E Referring to 48 CFR 9, DEAR, Part 970, *DOE Management and Operating Contracts*, describe how the Accountability Rule is applied to unauthorized commitments.

ANSWER 4.9-E Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitment, the Contracting Officer shall advise that person that the work is unauthorized and performance is at the person's own risk. This could result in no compensation for work performed in the past or in the future.

EXERCISE 4.9-F Identify the key elements and features of an effective DOE and operating contractor relationship.

ANSWER 4.9-F An effective DOE and operating contractor relationship includes the following features:

- High operating standards established by management
- Communication of operating standards to the working level
- Sufficient resources provided to the operations department
- Ensurance that personnel are well trained
- Close monitoring of performance in operations
- Accountability of workers and their supervisors for their performance in conducting activities

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EXERCISE 4.9-G Identify the roles and responsibilities for the Heads of Field Organizations listed in DOE Order 5480.19, *Guidelines for the Conduct of Operations at DOE Facilities*.

ANSWER 4.9-G As an environmental compliance professional, you may be tasked with the roles and responsibilities of the Heads of Field Elements listed in DOE Order 5480.19, *Guidelines for the Conduct of Operations at DOE Facilities*. This includes the following:

1. Ensure that adequate contractor plans, procedures, and programs are in place and assess the effectiveness of their implementation at sites under their jurisdiction, consistent with the provisions of this Order.
2. Ensure that DOE Facility Representatives are assign responsibility for a major facility or group of lesser facilities, and oversee the day-to-day conduct of operations at these facilities in accordance with the requirements of this Order and the direction received from the Program.

EXERCISE 4.9-H Define the term, “Federal Norm.”

ANSWER 4.9-H The Federal Norm refers to those fundamental principles embodied in law and regulation that should be reflected in contractor procurements even though such procurements are not Federal procurements. In other words, the contractor is “required” to follow the same rules as DOE in purchasing products and services from vendors.

EXERCISE 4.9-I Describe the significance of the concept, Federal Norm, to the Department and contractor activities.

ANSWER 4.9-I Following the accepted practice of purchasing products and services in accordance with the Federal Norm has historically increased the overall cost to DOE. With DOE’s transition to performance-based contracting has come the expectation that the contractor will rely on standard business practices when purchasing products and services.

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EXERCISE 4.9-J What is the purpose of DOE Order 5480.29?

ANSWER 4.9-J “To create the framework for promptly identifying, reporting, and resolving employee concerns regarding Department of Energy (DOE) facilities or operations . . . The primary purpose of this framework is to complement existing employee reporting procedures in order to allow an independent avenue for anonymous and confidential reporting and evaluation of employee ES&H concerns without supplanting existing requirements in DOE Orders, rules, and regulations for employee reporting.” (DOE Order 5480.29, section 1)

EXERCISE 4.9-K What is the role of DOE technical personnel regarding DOE Order 5480.29?

ANSWER 4.9-K In addition to the requirements for compliance with the notification and support provisions of the Order, environmental compliance personnel may be called upon to assist in performing worksite inspections, or in the evaluation of concerns raised under the Order. (DOE Order 5480.29, Attachment I, Chapter I, Section 5 and Section 6)